South Carolina Law Review

Volume 35
Issue 1 *Annual Survey of South Carolina Law*

Article 7

Fall 1983

Criminal Law

Thomas C. Taylor

CRIMINAL LAW

I. Accessory Crimes: Extent to Which a Defendant Can Assert Defenses Available to the Principal

In *State v. Price*,[1] the South Carolina Supreme Court discussed the common law crime[2] of accessory after the fact of murder and the extent to which an accused may personally assert the defenses of the principal felon. In affirming the appellant's conviction, the court reiterated its long-held position that "the jury in the trial of the accessory must find as a fact [that] the principal did actually commit the crime."[3] However, *Price* arguably weakens this requirement by upholding an accessory conviction when there was a serious question whether the principal felon actually committed murder as defined by the South Carolina Code.[4]

On September 6, 1980, police found the body of the appellant's eight year-old niece in the attic of an abandoned house owned by the appellant and her husband. The appellant's two sons, who were both witnesses for the State at trial, testified that they were playing in the abandoned house with their young

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1. ___ S.C. ___, 294 S.E.2d 426 (1982).

2. Accessory after the fact is a common law felony in South Carolina. *See* W. McAninch & G. Fairey, The Criminal Law of South Carolina 232-33 (1982). The elements of the crime as stated by the supreme court are as follows:

> An accessory after the fact is one who, knowing a felony to have been committed receives, relieves, comforts, or assists the felon. . . . Three conditions must unite to render one an accessory after the fact: (1) *The felony must be complete.* (2) The accessory must have knowledge that the principal committed the felony. (3) The accessory must harbor or assist the principal felon. . . .

State v. Nicholson, 221 S.C. 399, 405, 70 S.E.2d 632, 634 (1952)(quoting 22 C.J.S. *Crim. Law* § 95)(emphasis added).

3. ___ S.C. at ___, 294 S.E.2d at 428.

4. "Murder" is defined in S.C. Code Ann. § 16-3-10 (1976) as "the killing of any person with malice aforethought, either express or implied."

In explaining to the trial court the State's plea agreement with its chief witness, the alleged principal felon, the solicitor stated: "Of course we have the burden of proving malice and murder [in any prosecution of the alleged principal felon for murder]. . . . I knew we had a difficult time with malice, I still have no evidence of malice, and to me proving murder would have been nigh impossible to do." Record, vol. II, at 520.

See also Record vol. II at 523-24, 779 (trial court did not believe State had any obligation to prove murder).

cousin when an argument arose between the victim and the appellant's twelve year-old son, Randy. During the argument, the victim threw a bottle, which hit Randy on the head. Randy testified that when he was hit he smelled alcohol[5] and lost control of his body. The next thing Randy remembered was the sight of his hands around the neck of his cousin who lay motionless.[6] He testified that he later informed his mother who, with the help of her sons, hid the body.

At trial, the appellant argued that her son had not committed murder because he was unconscious when he strangled the victim.[7] The defense asserted that without a murder, there can be no crime of accessory after the fact.

Pursuant to this line of defense, appellant attempted to show that no murder was committed through the testimony of a psychiatrist who had examined Randy. The psychiatrist would have testified that Randy was in the grip of an epileptic seizure at the moment the homicide occurred and was therefore unconscious.[8] The prosecution objected to the psychiatrist's testimony on the ground that the crime of accessory after the fact is a separate offense and that it would be improper for the accused "to avail himself of the principal's defenses."[9] The trial court sustained the prosecution's objection[10] and the jury returned a ver-

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5. *See generally* MERCK, SHARP & DOEHME, THE MERCK MANUAL OF DIAGNOSIS AND THERAPY (13 ed. 1977)(olfactory hallucinations are symptomatic of certain types of epileptic seizures). Randy's testimony is, presumably, evidence that he was unconscious at the time of the homicide.

6. Record, vol. I, at 490-92.

7. *See* W. MCANINCH & G. FAIREY, *supra* note 2, at 15 ("Every criminal offense involves either the commission of an act or an omission . . . all these acts and omissions must share a common characteristic for criminal liability to obtain: all must be voluntary.").

8. The proffered testimony consisted of the following:

> [A]t the time Randy Price strangled this girl it was committed during the process or the progress of a temporal lobe epileptic seizure during which time Randy Price was unconscious. It was during the postitcal, i-t-c-a-l, stage of that seizure and this witness will relate in court that a person in the postitcal stage of a frontal lobe seizure has no capacity to do anything voluntary or to do anything.

___ S.C. at ___, 294 S.E.2d at 427.

9. Record vol. I, at 454.

10. The trial court cited State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976)(holding the conviction of an accessory valid when the principal was acquitted because proof of the commission of a felony by the principal was made at the accessory's trial), and State v. Burbage, 51 S.C. 284, 28 S.E. 937 (1898)(holding the principal's conviction for

dict of guilty.

The supreme court relied on two factors in upholding the trial court's refusal to admit the psychiatrist's testimony. The court noted that the alleged principal felon, Randy, had testified fully on the facts surrounding the victim's death, and that the State had stipulated that he might be suffering from epilepsy. Therefore, the court concluded the question of Randy's capacity to commit the crime was before the jury for their consideration, and the proffered psychiatric testimony would have been cumulative, and so, properly excluded.[11]

The supreme court's conclusion on the cumulative nature of the psychiatric testimony is subject to several flaws. First, although the court stated that Randy testified fully, Justice Harwell noted in his dissent that the trial judge refused to permit the appellant's attorney to cross-examine Randy about his seizure because the witness was not a doctor and because the question was "self-serving."[12] Although this ruling by the trial court was raised on appeal, the majority did not address it. Second, Randy Price was not particularly expressive, and both sides had difficulty eliciting responses from him. Third, the youth testified that he could not remember what happened between the moment he was hit with the bottle and the moment he saw the victim lying motionless. Finally, the proffered expert testimony

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manslaughter did not preclude the State from using parol evidence to show that the principal had actually committed murder). The trial court also cited S.C. CODE ANN. § 17-21-60 (1976):

> *Venue for trial of accessories after the fact.*
>
> Whoever becomes an accessory to a felony after the fact may be indicted, convicted and punished, whether the principal felon has or has not been previously convicted or is or is not amenable to justice, by any court having jurisdiction to try the principal felon and either in the county in which such person became an accessory or in the county in which the principal felony was committed.

However, the authorities cited by the trial court stand for the proposition that the principal felon need not be *convicted* in order to convict the accessory; the cited authorities do not suggest that the State need not prove that the felony was committed by the principal to convict the accessory.

See also W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 524-25 (1972). At common law the court must find the principal felon guilty before it can try an accessory; the modern approach rejects this common law prerequisite to the conviction of the accessory and requires only that the State prove at the accessory's trial that the principal committed the felony. *Id.*

11. ___ S.C. at ___, 294 S.E.2d at 428.

12. *Id.* at ___, 294 S.E.2d at 430.

would have been cumulative only to the testimony of a twelve year-old child whose courtroom answers were haltingly given.

In any event, the psychiatric testimony would not have helped Mrs. Price given the supreme court's attitude toward Randy's unconsciousness. The court held that Randy's unconsciousness was not a defense; instead, it related only to the degree of culpability.[13] In support of this holding, the court quoted *State v. Coyle*:[14] " 'Insanity' arising during the progress of a difficulty voluntarily brought on by defendant, and as the result of a blow rightfully inflicted by his adversary, should not constitute excuse for his after conduct in such difficulty."[15]

Although somewhat analogous, *Coyle* is distinguishable from *Price*. In *Price*, the "blow rightfully inflicted" arose out of a childish altercation; in *Coyle*, the evidence suggested that Coyle "started at [the victim] with his knife open"[16] and the victim reacted by striking Coyle with an iron rod causing his unconsciousness. In *Coyle*, the court relied on the established principle that voluntary intoxication is no excuse for the commission of crime, and held that insanity resulting from a blow brought

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13. *Id.* at ___, 294 S.E.2d at 428. The court's statement that Randy's unconsciousness relates only to his degree of culpability is difficult to understand. Perhaps the phrase originates from the State's brief. In its brief, the respondent asserted that "since under the testimony of the principal felon, Randy Price, he would not be entitled to the defense [of unconsciousness] as a complete defense to culpability but only to the degree of his culpability, the defense of his incapacity is not available to the appellant." Brief for Respondent at 6. This assertion was based on the assumption that the alleged principal felon had done something unlawful or negligent prior to his unconsciousness. However, a careful analysis of the cases cited by the State in support of its argument that Randy's unconsciousness related only to his "degree of culpability" demonstrates how inapposite the State's argument was to the facts of *Price*. *See, e.g.*, Watkins v. People, 158 Colo. 485, 408 P.2d 425 (1965). In *Watkins*, the defendant, who had been drinking heavily all day, pointed a gun at the head of a bar patron. Observing the gun, the bartender struck the defendant with a black jack. The defendant then turned around and shot the bartender. The defendant asserted a defense of traumatic amnesia, and the court found that although such a defense, if proven, would negate the charge of first degree murder (which required express malice and premeditation under the law of Colorado), it did not relieve the defendant of all criminal responsibility because the occurrence was "well within the orbit of what might have been expected to happen under the circumstances." In *Watkins*, "degree of culpability" relates to the fact that one suffering from traumatic amnesia cannot be found guilty of first degree murder, but may be found guilty of a lesser offense. *See also* Commonwealth v. Crosby, 444 Pa. 17, 279 A.2d 73 (1971).

14. 86 S.C. 81, 67 S.E. 24 (1910).

15. *Id.* at 88-89, 67 S.E. at 27.

16. *Id.* at 83, 67 S.E. at 25.

about by the defendant's action was no defense to a subsequent stabbing.[17] Yet little comparison exists between a twelve year-old's responsibility for a blow inflicted by an eight year-old girl during an argument and the responsibility of a man who, with an open knife, approached another man causing him to strike his attacker in self defense.

Price is a narrow decision, however. The court indicates that Mrs. Price was properly allowed at trial to present evidence of her son's unconsciousness, but that, under the facts of this case, Randy's unconsciousness was not available as a defense to her. The court did not, however, explicitly reject unconsciousness as a valid defense to a criminal charge in South Carolina.[18] The court indicated that in a different fact situation, the unconsciousness of the principal might be a valid defense for one charged as an accessory after the fact.[19]

State v. Price is noteworthy in two respects. First, although proving murder is a necessary element in the prosecution's case against an accused accessory, the court does not appear prepared to make the task more onerous than to show that a killing had occurred. Second, the court's suggestion that in certain circumstances unconsciousness may be a valid defense to a crime could presage judicial acceptance in South Carolina not only of the defense of unconsciousness but other manifestations of automatism as well.[20]

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17. As indicated in W. LAFAVE & A. SCOTT, *supra* note 14, at 181, "although a voluntary act is an absolute requirement for criminal liability, it does not follow that every act up to the moment that the harm is caused must be voluntary." *See also* MODEL PENAL CODE § 2.01 (Proposed Official Draft 1962)(stating that liability must be "based on conduct which includes a voluntary act"). *Compare Coyle, infra* note 18 (voluntary act which attached criminal liability to the appellant's subsequent unconscious behavior was an assault with a knife) *with Price* (voluntary behavior which provoked the blow causing the unconsciousness was a childish disagreement).

18. Although Justice Harwell, in dissent, stated that the court had never addressed the defense of unconsciousness, the court had prior to *Price* implicitly accepted the validity of such a defense. *See* State v. Coyle, 86 S.C. 81, 67 S.E. 24 (1910).

19. This indication arises from the court's holding that "the defense of Randy's incapacity is not available to appellant, *under the facts of this case*. . . ." ___ S.C. at ___, 294 S.E.2d at 426 (emphasis added).

20. *See generally* State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975) (overruling State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969)); State v. Coffey, 43 N.C. App. 541, 259 S.E.2d 356 (1979); State v. Smith, 59 N.C. App. 227, 296 S.E.2d 315 (1982). These cases chart the recent and continuing development of judicial acceptance of automatism

II. Capital Punishment

A. *Validity of Statutory Limits on Recovery of Fees by Expert Witnesses and Court-Appointed Attorneys*

In *State v. Goolsby, (Goolsby II)*,[21] the South Carolina Supreme Court held that a trial judge may not disregard the maximum statutory payment[22] of $1,500 for fees and costs to court-appointed attorneys in death penalty cases.[23] In addition, the court upheld against an equal protection challenge the constitutionality of the statutory limit of $2,000 imposed in capital cases on state-paid investigative, expert, or other services[24] desired by counsel for indigent defendants.[25] The court indicated that it may allow recovery of attorneys' fees and costs in excess of $1,500 if the proper case involving "extraordinary circumstances" is brought before the bench,[26] but the court failed to outline what procedure it would use to analyze such a request.[27]

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as a defense in North Carolina.

21. ___ S.C. ___, 292 S.E.2d 180 (1982). State v. Goolsby (*Goolsby I*), 275 S.C. 110, 268 S.E.2d 31 (1980), *cert. denied*, 449 U.S. 1037 (1980), was the first appeal of appellant's conviction. That appeal led to the new sentencing proceeding from which the case under discussion arose.

22. S.C. Code Ann. § 16-3-26(B) (Supp. 1981) provides in part as follows: "The State shall pay from funds appropriated for the defense of indigents such fee and costs, not to exceed fifteen hundred dollars, as the court shall deem appropriate."

23. ___ S.C. at ___, 292 S.E.2d at 181.

24. S.C. Code Ann. § 16-3-26(C) (Supp. 1981) provides:

> Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment, from state funds appropriated for the defense of indigents, of fees and expenses not to exceed two thousand dollars as the court shall deem appropriate. Upon a finding that timely procurement of such services cannot await prior authorization, the court may authorize the provision of and payment for such services *nunc pro tunc*.

25. ___ S.C. at ___, 292 S.E.2d at 181.

26. *Id.* at ___, 292 S.E.2d at 181.

27. Until 1969 South Carolina had no statutory provision or common law precedent for compensating court-appointed attorneys. 1943-44 Op. Att'y Gen. 184. Act No. 309 of 1969, which became § 17-284 of the Code of Laws of 1962, provided compensation for the first time for court-appointed attorneys. That section provided in part for

> a reasonable fee to be determined on the basis of ten dollars per hour for time spent out of court and fifteen dollars per hour for time spent in court. In no event, however, shall such fee exceed the sum of five hundred dollars in a non-capital case and seven hundred and fifty dollars in a capital case through final

Sidney Ross Goolsby was indicted, convicted, and sentenced to death in 1978 for the murder of Ruby Ann Medlin.[28] On appeal, the supreme court reversed the death sentence and remanded the case for new sentencing.[29] Prior to the new sentencing proceeding, Goolsby's court-appointed counsel moved for the approval of approximately $3,000 in expenditures for psychiatric and psychological experts.[30] Following the new sentencing proceeding, the judge awarded attorneys' fees of $1,500 plus costs of approximately $666 and expert witness fees of nearly $2,500.[31] The South Carolina Court Administration appealed the awards[32] on two grounds: First, that the ordered payment of attorneys' fees and costs violated the statutory limit[33] and, second, that the trial judge erred in holding that the $2,000 maximum on expert witness fees violated the equal protection provisions of the South Carolina[34] and United States[35] Constitutions.[36]

The supreme court reduced all awards granted by the trial judge. Noting that section 16-3-26(B) clearly provides that the state shall pay "fees *and* costs, not to exceed fifteen hundred dollars" (emphasis added), the court held that the trial judge erred in not literally applying the statute.[37] Accordingly, the court modified the award to $1500 *in toto* for attorneys' fees and

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judgment on trial.

Act No. 177 of 1977 amended the 1962 Code of Laws by adding § 16-52.2 of which subsection (B) read in part: "The county in which the indictment was returned shall pay to appointed counsel such fees and costs, not to exceed fifteen hundred dollars, as the court shall deem appropriate." The apparent conflict in § 17-284 and § 16-52.2 was remedied by an opinion of the Attorney General that § 16-52.2 controlled the amount and method of compensation and costs to be paid because it was a later enactment which impliedly repealed the existing law. 1976-77 Op. Att'y Gen. 168. Section 16-52.2 became § 16-3-26 of the 1976 Code of Laws and was amended to reflect its current reading, note 22 *supra*, by Act No. 555 of 1978. No challenge to the sufficiency of the statutory compensation of any of the above sections has come before the South Carolina Supreme Court.

28. ___ S.C. at ___, 292 S.E.2d at 180.

29. 275 S.C. 110, 268 S.E.2d 31.

30. ___ S.C. at ___, 292 S.E.2d at 180. The trial judge indicated that he would consider the bills after trial. *Id.* at ___, 292 S.E.2d at 180.

31. *Id.* at ___, 292 S.E.2d at 181.

32. *Id.* at ___, 292 S.E.2d at 180.

33. *Id.* at ___, 292 S.E.2d at 181. *See supra* note 22.

34. S.C. CONST. art. I, § 3.

35. U.S. CONST. amend. XIV, § 1.

36. ___ S.C. at ___, 292 S.E.2d at 181.

37. *Id.* at ___, 292 S.E.2d at 181.

costs.[38] The trial judge asserted that section 16-3-26(C)[39] denies equal protection to an indigent defendant in a capital case because no corresponding statutory limitation on public expenditures exists for expert witness fees in non-capital cases. The supreme court rebutted this reasoning by finding that the legislature "obviously intended" no more than $2,000 be expended in non-capital cases.[40] The court thus rejected the equal protection challenge and reversed the trial judge's holding that section 16-3-26(C) is unconstitutional.[41]

In *Goolsby II*, the appellant did not challenge the constitutionality of section 16-3-26(B),[42] but he did assert that the trial judge had within his discretion the power to order payment of attorneys' fees and costs in excess of the statutory limit.[43] Responding to this argument, the court noted that other jurisdictions allow reimbursement in excess of statutory maximums when extraordinary circumstances exist. However, after concluding that no such exigencies existed in *Goolsby II*, the court declined to address the issue further.[44]

Courts in other jurisdictions have also narrowly construed exceptions to statutory limitations on attorneys' fees. In *Bias v. State*,[45] the Oklahoma Supreme Court held that a statutory limit of $350,[46] while not unconstitutional on its face, was unconstitutional when applied to a lawyer who expended over 250 hours and incurred other costs while representing an indigent accused of first degree murder.[47] The court in *Bias* stated, however, that a lawyer will rarely be burdened to the extent necessary to warrant additional fee compensation.[48]

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38. *Id.* at ___, 292 S.E.2d at 181.

39. *See supra* note 24.

40. ___ S.C. at ___, 292 S.E.2d at 181.

41. *Id.* at ___, 292 S.E.2d at 181.

42. Similar statutes have been upheld against claims that indigent defense assignments constitute involuntary servitude, deny equal protection of the law, and take property without due process or just compensation. *See, e.g.*, Tyler v. Lark, 472 F.2d 1077 (8th Cir. 1973); Dolan v. United States, 351 F.2d 671 (5th Cir. 1965); United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); Jackson v. State, 413 P.2d 488 (Alaska 1966).

43. Brief for Respondent at 2.

44. ___ S.C. ___, 292 S.E.2d at 181.

45. 568 P.2d 1269 (Okla. 1977).

46. OKLA. STAT. tit. 22, §§ 464, 1271 (1971).

47. 568 P.2d at 1271.

48. *Id.* at 1272-73. Any attorney asserting this claim must prove through clear and

The Supreme Court of Illinois recognized the "extraordinary circumstances" exception in *People v. Randolph*.[49] Although the statutory limit on fees was $500, the *Randolph* court awarded approximately $31,000 for fees and costs incurred by defense counsel while representing four inmates charged with murder during a prison riot.[50] In allowing the claim, the court relied on its "inherent power . . . to enter an appropriate order ensuring that counsel do not suffer an intolerable sacrifice and burden and that the indigent defendants' right to counsel is protected."[51] The court stated, however, that "the 500 dollar maximum is reasonable and appropriate where an appointed attorney can continue to accomodate his regular practice. . . ."[52]

Although the supreme court in *Goolsby II* failed to outline a test to determine "exceptional circumstances," incurring costs and fees which exceed the statutory limit clearly is not by itself sufficient to trigger the "exceptional circumstances" doctrine.[53]

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convincing evidence that: (1) all extraordinary actions were taken in good faith; (2) all extraordinary work performed was necessary; (3) he was unable to maintain his practice (which will depend upon the nature of counsel's practice); and (4) the fee is reasonable. *Id.* The court also stated that attorneys' expenses must be similarly proven and that, except in emergencies, all extraordinary professional services and expenses must receive prior approval by the trial court. *Id.* at 1273.

49. 35 Ill.2d 24, 219 N.E.2d 337 (1966).

50. *Id.* at 25-28, 219 N.E.2d at 338-40. The expenses of the lengthy trial included the attorneys' time spent questioning over 1,150 potential jurors and the time spent during trial, a period in which the prosecution expected to call over 100 witnesses. The motion for payment of fees above the limit was made during trial because a lawyer asserted that he needed financial reimbursement to pay his living expenses.

51. *Id.* at 29, 219 N.E.2d at 340.

52. *Id.* at 30, 219 N.E.2d at 340-41. A similar result was reached in Daines v. Markoff, 92 Nev. 582, 555 P.2d 490 (1976). The Nevada Supreme Court denied compensation above a statutory limit because personal sacrifice and reduction in personal income do not qualify as extraordinary circumstances justifying excess fees. *Id.* at 585, 555 P.2d at 493.

The statute under which the attorneys claimed, NEV. REV. STAT. § 7.260 (1965), limited compensation for counsel to $300 for services in the district court unless the crime was punishable by death, in which event the fee was not to exceed $1,000. Since that time, the Nevada legislature raised the maximum fee for attorneys representing an indigent charged with murder to $2,500, NEV. REV. STAT. § 7.125(2)(1979), and provided for payment above the limit under extraordinary circumstances if "the court in which the representation was rendered certifies that the amount of excess payment is both reasonable and necessary. . . ." NEV. REV. STAT. § 7.125(4)(1979).

53. *See supra* notes 49, 52 and accompanying text. Congress has limited compensation for appointed counsel in federal cases. 18 U.S.C. § 3006A(d)(2)(1976). The ceiling may be waived in cases of extended or complex representation. *Id.* at § 3006A(d)(3). An attorney must request additional compensation from the district judge whose decision is

Since Goolsby's attorneys did not show that they suffered an "intolerable sacrifice and burden," the supreme court correctly denied fees and costs in excess of the maximum amount allowed by statute.[54]

An issue not fully addressed by the court in *Goolsby II* concerns the constitutionality of an arbitrary limit on costs incurred by the state in providing expert witnesses for an indigent defendant. The court held that section 16-3-26(C) applied in all cases involving indigent defendants. The rights of indigent defendants compared with those of non-indigent defendants was not discussed.

Prior to the decision in *Griffin v. Illinois*,[55] the United States Supreme Court showed little concern for the rights of indigent defendants.[56] *Griffin* marked a turning point in the Court's recognition of indigent defendants' right to due process and equal protection. The Court imposed an affirmative duty on the states to eliminate inequalities caused by laws that discriminate against indigents.[57] While the holding of *Griffin* involved a defendant's right to trial transcripts, lower courts later expanded the *Griffin* rationale to include the right to expert assistance.[58]

The Supreme Court signaled a new, conservative approach to indigents' rights in *Ross v. Moffitt*.[59] There, the Court announced that states are not required to furnish an indigent with counsel on discretionary state appeals or on application for certiorari to the Supreme Court.[60] In his opinion for the Court, Justice Rehnquist purported to use both a due process and equal protection analysis[61] in formulating a test which focuses on

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not subject to review. United States v. Smith, 633 F.2d 739, 740 (7th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981).

54. For a contrary view, see 1 ABA STANDARDS FOR CRIMINAL JUSTICE ch. 5 § 2.4 (1980)(the American Bar Association completely rejects the concept of pro bono work in criminal cases).

55. 351 U.S. 12 (1956). The opinion of the Court was written by Justice Black, and was joined by Chief Justice Warren, Justice Clark, and Justice Douglas.

56. *See, e.g.*, United States *ex rel.* Smith v. Baldi, 344 U.S. 561 (1953); McGarty v. O'Brien, 188 F.2d 151 (1st Cir. 1951), *cert. denied*, 341 U.S. 957 (1951).

57. 351 U.S. at 17-18.

58. *See, e.g.*, Jacobs v. United States, 350 F.2d 571 (4th Cir. 1965); People v. Watson, 36 Ill.2d 228, 221 N.E.2d 645 (1966).

59. 417 U.S. 600 (1974).

60. *Id.* at 615-19.

61. *Id.* at 609-13. The Court explained: "Due process, emphasizes fairness between

whether the defendant has been provided an adequate opportunity to fairly present his claims.[62] While at least one lower court has disregarded the precedent of *Ross*,[63] other courts have relied on the opinion to deny an indigent defendant's request for expert assistance at trial.[64]

Currently, the "adequate opportunity" test of *Ross* continues as the United States Supreme Court benchmark. Nevertheless, the reasoning in *Ross* may in time be used to mount successful challenges to statutes, such as South Carolina's, which set a low, arbitrary limit on expert witness fees. As inflation erodes the purchasing power of the statute's prescribed limits, courts will find it increasingly difficult to reconcile the indigent's progressively ineffective defense with the principles of fairness underpinning the "adequate opportunity" test.[65] In addition, the holding of *Ross* may be used to challenge the maximum limit placed on attorneys' fees. If absolutely barred from recovering fees above a small statutory maximum, appointed attorneys will be inclined to choose the least expensive resolution of their client's case. A defendant could then argue that the statute violates his right to effective assistance of counsel by creating an undeniable conflict between the interests of the indigent defen-

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the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Id.* at 609. Some commentators suggest that the analysis adopted by Justice Rehnquist in *Moffitt* is the same due process analysis advocated by Justice Harlan in many of his opinions. *See, e.g.*, Note, *Constitutional Law—Right to Counsel—Due Process—Equal Protection—State is Not Required to Provide Counsel for Discretionary Appeals*, 28 RUTGERS L. REV. 751, 761 (1975).

62. 417 U.S. at 612. The test does not consider whether a wealthier defendant has a better opportunity to present his claims, since relative handicaps among defendants are constitutionally permissible: "the Fourteenth Amendment does not require absolute equality or precisely equal advantages." *Id.* (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973)).

63. *See* Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980).

64. *See, e.g.*, Dorsey v. Solomon, 435 F. Supp. 725, 736 (D. Md. 1977); State v. Gray, 292 N.C. 270, 277, 233 S.E.2d 905, 910 (1977); Graham v. State, 547 S.W.2d 531, 535 (Tenn. 1977).

65. In anticipation of continued inflation, $2,000 may be inadequate to provide the sums which experts often require. While little case law exists on criminal experts, several civil cases in which experts were used may provide an indication of future problems. *See, e.g.*, Burgess v. Williamson, 506 F.2d 870, 879 (5th Cir. 1975)($20,000, accountant); Osguthorpe v. Anshutz Land & Livestock Co., 456 F.2d 996, 1004 (10th Cir. 1972)($25,000, veterinarian).

dant and his appointed counsel.

In conclusion, *State v. Goolsby (Goolsby II)* reaffirmed the state's power to limit attorneys' fees and costs as well as expert witness expenditures in indigent defense cases. The court, however, indicated a willingness to reassess the provisions on maximum attorneys' fees and costs under the proper circumstances. Regardless of its own inclination, the court may be forced in the near future to re-examine both the limitation on expert witness procurement and the limitation on attorneys' fees in light of the fundamental fairness principles enunciated by the United States Supreme Court in *Ross v. Moffitt*.

Thomas C. Taylor

B. Aggravating Circumstances do not Have to be Set Out in the Indictment

State v. Butler[66] is another in a line of cases[67] which establishes guidelines for adherence to the South Carolina Death Penalty Act.[68] In *Butler*, the South Carolina Supreme Court held that aggravating circumstances need not be set out in the indictment, that any direct or circumstantial evidence reasonably tending to prove the guilt of the accused creates a jury issue, and that equating substantial doubt with reasonable doubt is not an error.[69]

Horace Butler was convicted of murder before the General Sessions Court of Charleston County.[70] In the pre-sentence phase of the trial, the prosecution presented evidence of rape as an aggravating circumstance, and the jury returned the death penalty.[71] The South Carolina Supreme Court unanimously af-

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66. 277 S.C. 452, 290 S.E.2d 1 (1982), *cert. denied*, 51 U.S.L.W. 3285 (U.S. Oct. 12, 1982)(Brennan and Marshall, JJ., dissenting).

67. *See, e.g.*, State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980); State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979).

68. S.C. CODE ANN. §§ 16-3-20 to -28 (Supp. 1981).

69. 277 S.C. at 458, 290 S.E.2d at 3,4. Although a number of issues were considered, the only new issue the court faced was whether the aggravating circumstances must be set out in the indictment. Justice Marshall discussed extensively the issues of the trial judge's jury instruction and evidentiary standards of review in his dissenting opinion, which was published upon the United States Supreme Court's denial of Butler's writ of certiorari.

70. Record, vol. II, at 949.

71. *Id.*, vol. III, at 1034.

firmed Butler's sentence, and the United States Supreme Court, with Justices Brennan and Marshall dissenting,[72] denied his writ of certiorari.

In his argument before the South Carolina Supreme Court, the appellant asserted that his state constitutional rights were violated because the indictments failed to specify any statutory aggravating circumstances for the grand jury to consider prior to the actual trial.[73] The appellant also argued that there was insufficient evidence to submit the aggravating circumstance of rape to the jury and that the trial judge erred in his instructions to the jury by equating substantial doubt with reasonable doubt.[74]

In affirming Butler's sentence, the South Carolina Supreme Court held that the appellant received the notice required by article I, section 11[75] of the South Carolina Constitution when the grand jury indicted him for murder.[76] The court reasoned that the appellant received the death penalty for murder and not for the aggravating circumstance.[77] Furthermore, the court noted that the Death Penalty Act does not specifically require that the indictment include the aggravating circumstances because the murder charge by itself was sufficient. Finally, the court rejected the appellant's arguments that there was insufficient evidence of rape and that the trial judge erred in equating substantial doubt with reasonable doubt.[78]

The issue of whether the aggravating circumstances must be set out in the indictment is one of first impression for the court. The court, however, gave only cursory treatment to this issue. The court held that the statutory notice is "sufficient" and that the "statute does not require the aggravating circumstances to be included in the indictment."[79] The South Carolina Death

72. 51 U.S.L.W. 3285 (U.S. Oct. 12, 1982).

73. 273 S.C. at 456, 290 S.E.2d at 3.

74. *Id.* at 457, 290 S.E.2d at 4.

75. Art. I, § 11 states: "No person shall be held to answer for any crime where the punishment exceeds a fine of two hundred dollars or imprisonment for thirty days, unless on presentment or indictment of a grand jury of the county where the crime shall have been committed. . . ."

76. 277 S.C. at 457, 290 S.E.2d at 4.

77. *Id.*, 290 S.E.2d at 4. The court held that the punishment for the crime is not part of the pleading charging the crime. *Id.* at 456, 290 S.E.2d at 3.

78. *Id.* at 458, 290 S.E.2d at 4.

79. *Id.* at 457, 290 S.E.2d at 4.

Penalty Act requires the solicitor to notify the defendant's attorney at least thirty days prior to trial if the State intends to seek the death penalty.[80] The solicitor must also give the accused written notice before trial of the evidence which the State will use to prove the aggravating circumstances.[81] This statutory notice, the court held, is sufficient to insure the protection of the defendant's due process rights.

Although the South Carolina Supreme Court unanimously affirmed Butler's death sentence, Justices Brennan and Marshall dissented from the United States Supreme Court's denial of Butler's writ of certiorari.[82] Justice Brennan based his dissent upon his view that "the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments."[83] Justice Marshall dissented "because both the trial court's instructions concerning the standard of proof and the State Supreme Court's standard for reviewing the sufficiency of the evidence failed to assure a reliable sentencing determination."[84]

Justice Marshall's dissent raised two points. First, since the death penalty cannot be imposed unless the state proves at least one aggravating circumstance, Justice Marshall reasoned that the presence of aggravating circumstances is functionally an element of capital murder.[85] He then cited the Court's decision in *In re Winship*[86] for the proposition that aggravating circumstances must be proven beyond a reasonable doubt.[87] In *Butler*, however, the trial judge's instructions to the jury equated rea-

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80. S.C. CODE ANN. § 16-3-26(A) (Supp. 1981), states as follows:

> Whenever the Solicitor seeks the death penalty, he shall notify defense attorney of his intention to seek such penalty at least 30 days prior to the trial of the case. At the request of the defense attorney, the defense attorney shall be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

81. S.C. CODE ANN. § 16-3-20(B)(Supp. 1981), which states in part that "only such evidence in aggravation as the State has made known to the defendant in writing prior to trial shall be admissible. . . ." *See also* Hubbard, Burry & Widener, *A "Meaningful" Basis for the Death Penalty: Practice, Constitutionality, and Justice of Capital Punishment in South Carolina*, 34 S.C.L. REV. 391, 415 (1982).

82. 51 U.S.L.W. 3285 (U.S. Oct. 12, 1982).

83. ___ S.C. at ___, 290 S.E.2d at 1.

84. *Id.*, 290 S.E.2d at 1.

85. *Id.*, 290 S.E.2d at 1 (citing S.C. CODE ANN. § 16-3-20(C)(Supp. 1981)).

86. 397 U.S. 358 (1970).

87. *Id.* at 364.

sonable doubt with "substantial doubt."[88] Justice Marshall observed that this instruction might confuse the jury about the proper standard of proof[89] and creates a danger that the jury "may have found the existence of the aggravating circumstance on lesser showing than beyond a 'reasonable doubt.' "[90]

Although the use of substantial doubt in jury instructions has been criticized as confusing,[91] its use does not create reversible error.[92] Nevertheless, this risk of confusion becomes even more dangerous and surely less tolerable when the defendant's life is at stake.[93]

Second, Justice Marshall discusses the South Carolina Supreme Court's standard of evidentiary review. The South Carolina Death Penalty Act requires the South Carolina Supreme Court to review all death sentences to determine whether the evidence supports the jury's findings of aggravating circumstances.[94] In *Butler*, the South Carolina Supreme Court held that "[a]ny evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue."[95]

Justice Marshall, citing *State v. Bailey*,[96] stated that the South Carolina Supreme Court equates the "any evidence" standard with the "no evidence" standard of *Thompson v. Louisville*.[97] The United States Supreme Court has rejected *Thompson*'s no evidence standard;[98] thus, Justice Marshall asserted, the South Carolina Supreme Court's continued use of a

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88. 277 S.C. at 458, 290 S.E.2d at 4. The trial judge instructed the jury that a reasonable doubt means "a substantial doubt for which an honest person seeking the truth can give a real reason," and is "not a weak or slight doubt, but . . . a serious or strong or substantial well founded doubt as to the truth of the matters asserted by the state." *Id.*, 290 S.E.2d at 4.

89. "At a minimum, instructions equating reasonable doubt with 'substantial doubt' can confuse the jury about the proper standard of proof." 51 U.S.L.W. at 3286 (quoting Taylor v. Kentucky, 436 U.S. 478, 488 (1978)).

90. 51 U.S.L.W. at 3286.

91. *See* Taylor v. Kentucky, 436 U.S. 478, 488 (1978). *Cf.* Cool v. United States, 409 U.S. 100 (1972).

92. 436 U.S. at 488.

93. 51 U.S.L.W. at 3286 (citing Beck v. Alabama, 447 U.S. 625, 637 (1980))(discussing failure to give a jury the option of convicting on a lesser included offense)).

94. S.C. CODE ANN. § 16-3-25(A), (C)(2) (Supp. 1981).

95. 277 S.C. at 457, 290 S.E.2d at 4 (emphasis in original)(citing State v. Hill, 268 S.C. 290, 234 S.E.2d 219, *cert. denied*, 434 U.S. 870 (1977)).

96. 253 S.C. 304, 170 S.E.2d 376 (1969).

97. 362 U.S. 199 (1960).

98. Jackson v. Virginia, 443 U.S. 307 (1970).

"pseudo" no evidence standard fails to adequately insure the reliable imposition of the death sentence.[99]

In *Bailey*, the South Carolina Supreme Court stated the evidentiary standard of review as "if there is any evidence which tends to establish the guilt of the defendant;"[100] in *Butler*, the standard used was "*[a]ny* evidence direct or circumstantial *reasonably* tending to prove the guilt of the accused. . . ."[101] The addition of the word "reasonably" suggests that the "any evidence" standard should be interpreted as requiring evidence upon which a juror could reasonably find the accused guilty. Thus, the any evidence standard, as applied by the South Carolina Supreme Court, is consistent with the United States Supreme Court's test of whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[102]

In conclusion, the South Carolina Supreme Court has decided *State v. Butler* in a manner consistent with the majority view of the United States Supreme Court. However, Justice Marshall's dissent raises pertinent questions about the reasonable doubt instruction and evidentiary standards of review which the legal community should examine closely to insure that the accused receives a fair and adequate trial.

Arthur E. Justice, Jr.

III. NEW RULES FOR DISCOVERY AND PRELIMINARY HEARINGS

In *State v. Keenan*,[103] the South Carolina Supreme Court struck down South Carolina's preliminary hearing provisions[104] as unconstitutional and replaced it with two new rules of criminal procedure.[105] This decision creates a new right of discovery

99. 51 U.S.L.W. at 3286.

100. 253 S.C. at 308-09, 170 S.E.2d at 1378.

101. *See supra* note 95. (*Any* emphasis in original, *reasonably* emphasis added).

102. 443 U.S. at 318-19.

103. ___ S.C. ___, 296 S.E.2d 676 (1982).

104. The offending sections were S.C. CODE ANN. § 17-23-160 (Supp. 1981)(repealed Oct. 7, 1982) and § 22-5-320 (Supp. 1981)(repealed Oct. 7, 1982), which provided for the right to a preliminary hearing and notice of such right. According to the supreme court's analysis, when these statutes were declared unconstitutional, the remainder of article 5, chapter 5 of Title 22 of the South Carolina Code which set out procedures incident to the holding of a preliminary hearing was rendered meaningless.

105. S.C. RULES OF THE CIRCUIT COURT, Rules 103 and 104 (effective date: Oct. 7,

in criminal proceedings and redefines state procedures for preliminary hearings.

The defendant in *Keenan* was charged with armed robbery. He did not receive notice of his right to a preliminary hearing and maintained that he had never been served with a copy of the arrest warrant. Neither Keenan nor his counsel was apprised of the armed robbery charge against the defendant until the day of the trial.[106] Keenan was convicted of armed robbery and sentenced to twenty-five years imprisonment.[107]

On appeal, the appellant argued that because he had not received notice of his right to a preliminary hearing, the Court of General Sessions had not obtained jurisdiction over the matter at the time Keenan was tried.[108] The supreme court agreed with the defendant's argument. However, the court affirmed the conviction on the grounds that the jurisdictional language of section 22-5-320 was unconstitutional and, therefore, the Court of General Sessions had not been without jurisdiction to try the matter.[109]

In striking down the preliminary hearing procedures, the court found that sections 17-23-160[110] and 22-5-320[111] were in

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1982).

106. Record at 14. The court did not address the combined fact that there was no preliminary hearing and that the public defender representing Keenan was not informed of the charge against his client until the day of trial. The court's only response to appellant's consequent claim of denial of effective assistance of counsel, Brief for Appellant at 3, was its statement that: "We have carefully considered appellant's remaining allegation of error and find it to be without merit." ___ S.C. at ___, 296 S.E.2d at 679.

107. Brief for Appellant at 4-6; Record at 10-18.

108. ___ S.C. at ___, 296 S.E.2d at 677.

109. *Id.* at ___, 296 S.E.2d at 677.

110. S.C. CODE ANN. § 17-23-160 provided as follows:

When any person charged with a crime who is entitled to a preliminary hearing on such charges appears in person or by counsel in a hearing to set bond, he shall be notified by a magistrate orally and in writing of his right to such preliminary hearing. When a person is notified of his right to a preliminary hearing, he shall be furnished a simple form providing him an opportunity to request a preliminary hearing by signing and returning this form to the advising magistrate then and there or thereafter. Any person so notified who fails to timely request a preliminary hearing shall lose his right to such hearing.

111. S.C. CODE ANN. § 22-5-320 provided as follows:

Any magistrate who issues a warrant charging a crime beyond his jurisdiction shall grant and hold a preliminary hearing of it upon the demand in writing of the defendant made within twenty days of the hearing to set bond for such charge; provided, however, that if such twenty-day period expires on a date prior to the convening of the next term of General Sessions Court having juris-

direct contravention of sections 7 and 23 of article V of the South Carolina Constitution.[112] The court determined that although the constitution specifically allows the legislature to grant exclusive jurisdiction to the magistrate's court over designated criminal cases,[113] section 7 of article V requires the Court of General Sessions to retain its original concurrent jurisdiction in the absence of an exclusive grant.[114] The court found that section 22-5-320 deprived the Court of General Sessions of jurisdiction until after the preliminary hearing, but did not grant exclusive jurisdiction to the magistrate and was, therefore, unconstitutional.[115]

The court in *Keenan* noted that its holding not only obliterated the statutory scheme for preliminary hearings in South Carolina,[116] but that it also deprived criminal defendants of the

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diction then the defendant may wait to make such request until a date at least ten days before the next term of General Sessions Court convenes. At the preliminary hearing, the defendant may cross-examine the state's witnesses in person or by counsel, have the reply in argument if there be counsel for the State, and be heard in argument in person or by counsel as to whether a probable case has been made out and as to whether the case ought to be dismissed by the magistrate and the defendant discharged without delay. *When such a hearing has been so demanded the case shall not be transmitted to the court of general sessions or submitted to the grand jury until the preliminary hearing shall have been had, the magistrate to retain jurisdiction and the court of general sessions not to acquire jurisdiction until after such preliminary hearing.* Provided, however, that the defendant shall not be required to appear in person at the appointed time, date and place set for the hearing if he is represented by his attorney.

(Emphasis added).

112. ___ S.C. at ___, 296 S.E.2d at 678.

113. S.C. CONST. art. VI, § 23.

114. The question of § 22-5-320's constitutionality was raised for the first time by the court and not the parties. An order of the supreme court dated July 15, 1982, raised the issue of constitutionality:

> In this appeal from a conviction for armed robbery, the appellant has asserted that the Court of General Sessions may have been without jurisdiction to try him. The Court desires to hear argument on whether S.C. Code Ann. § 22-5-320 (Supp. 1981) unconstitutionally deprives the Court of General Sessions of the jurisdiction granted it in Article V, section 7 of the State Constitution. The briefs of the appellant and respondent should be filed with the Clerk of this Court by July 30 and August 13, 1982, respectively. Argument on this issue only, and any subsidiary question fairly comprised therein as it may affect this appeal, will be heard in a special session of the Court on August 17, 1982. A reply brief may be filed prior to argument.

Supplemental Brief for Appellant at ii.

115. ___ S.C. at ___, 296 S.E.2d at 678.

116. *See, supra*, note 104.

minimal opportunity for discovery which had been available through the preliminary hearing.[117] Consequently, the court adopted two new circuit court rules to fill the void left by the *Keenan* decision.[118]

To replace the statutory scheme for preliminary hearings, the supreme court adopted Rule 104,[119] which provides a hearing, notice of the right to such a hearing, and the time frame in which the notice and the hearing shall be given. Unlike the preliminary hearing statute, Rule 104 does not deprive the Court of General Sessions of its original concurrent jurisdiction.

In the text of Rule 104, the court strongly implies that the preliminary hearing is no longer a discovery mechanism by referring to the preliminary hearing as a device "solely to determine whether sufficient evidence exists to warrant the defendant's detention and trial."[120] Further, no right to a preliminary hearing exists under Rule 104 if the grand jury indicts a defendant or if a defendant waives indictment prior to a preliminary hearing.[121] In addition, Rule 104 provides that any delay in holding the preliminary hearing shall *not* be grounds for a delay in prosecution of the case in the Court of General Sessions.

In its formation of Rule 104, the court apparently questions the need for the preliminary hearing. This attitude may have influenced the court's decision to deprive the defendant in *Keenan* of a preliminary hearing by striking the preliminary hearing statute without first applying it to the defendant, and then proceeding to adopt the new rules without any retroactive application. This judicial strategy may indicate that the court does not share the legislature's vision of how a preliminary hearing should operate.[122]

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117. ___ S.C. at ___, 296 S.E.2d at 679.

118. The South Carolina Supreme Court promulgated these rules of criminal procedure pursuant to S.C. CONST. art. V, § 4 which provides in pertinent part: "Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all [state] courts." *Keenan* created a void in the statutory law which afforded the court the opportunity to adopt Rules 103 and 104.

119. S.C. RULES OF THE CIRCUIT COURT, Rule 104 (effective date: Oct. 7, 1982).

120. *Id.*

121. *Id.* Rule 104 also provides: "If probable cause be found by the magistrate, the defendant shall be bound over to the Court of General Sessions. If there be a lack of probable cause, the defendant shall be discharged; but his discharge shall not prevent the State from instituting another prosecution for the same offense."

122. *Compare* S.C. CODE ANN. § 22-5-320 ("At the preliminary hearing, the defen-

Because its decision in *Keenan* would otherwise serve to bar discovery in criminal cases, the court enacted Circuit Court Rule 103,[123] which grants the defendant, and in some instances the prosecution, the right to seek disclosure of certain materials and information.[124] Rule 103 is, as the *Keenan* court noted, an adaptation of Rule 16 of the Federal Rules of Criminal Procedure.[125]

After *Keenan*, a criminal defendant's right to a preliminary hearing is no longer secured by statute, but exists under Circuit Court Rule 104, as promulgated by the supreme court. *Keenan* also marks the introduction of formal discovery rules for criminal proceedings in South Carolina.

Joslyn V. Wood

IV. PLEA BARGAINING: WHEN IS THE BARGAIN BINDING?

In *State v. Thompson*,[126] the South Carolina Supreme Court held that an appellant was not entitled to enter a guilty plea in return for a life sentence on the basis of pretrial plea negotiations because the solicitor had never promised him such an arrangement.[127] The court also refused to enforce the appellant's plea proposal because the plea negotiations between the

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dant may cross-examine the State's witnesses in person or by counsel, have the reply in argument if there be counsel for the State, and be heard in argument in person or by counsel as to whether a probable case has been made out. . . .") *with* Rule 104 ("defendant . . . shall be given notice of his right to a preliminary hearing solely to determine whether sufficient evidence exists to warrant the defendant's detention and trial").

123. S.C. RULES OF THE CIRCUIT COURT, Rule 103 (effective date: Oct. 7, 1982).

124. ___ S.C. at ___, 296 S.E.2d at 679.

125. Circuit Court Rule 103 allows the defense to discover records of statements made by the defendants, the defendant's prior criminal record, relevant documents and tangible objects held by the prosecution and reports of relevant examinations and tests performed for prosecution. Internal reports and memoranda prepared by the prosecution and not included in the previously mentioned categories are not discoverable. Statements made by prosecution witnesses may not be obtained prior to trial without a court order.

If the defense elects to discover the evidence, the prosecution may require disclosure by the defense of relevant documents, tangible objects and test results. S.C. RULES OF THE CIRCUIT COURT, Rule 103(b). *Cf.* FED. R. CRIM. P. 26.2 (requiring disclosure of statements made by *defense* witnesses).

Rule 103 also places a continuing duty to disclose newly discovered evidence if disclosure of that evidence has been previously requested or ordered. S.C. RULES OF THE CIRCUIT COURT, Rule 103(c).

126. ___ S.C. ___, 292 S.E.2d 581 (1982).

127. *Id.* at ___, 292 S.E.2d at 584.

appellant and State were neither specific nor unambiguous, and because the solicitor's promise to consider the proposal was made with reservations.[128] In considering the issue of a defendant's right to enforce a pretrial plea proposal,[129] the South Carolina Supreme Court decided *Thompson* without clarifying the South Carolina law governing this issue.[130]

Appellant Albert "Bo" Thompson was arrested and indicted for the armed robbery and murder of George Toubia.[131] Before trial, the solicitor indicated to Thompson's attorneys that the State might be receptive to plea negotiations.[132] After discussing the matter with his attorneys, appellant Thompson decided to plead guilty if the State would agree to a life sentence.[133] In response to this proposal[134] the solicitor advised Thompson's attorneys that the State would consider such an arrangement only after Thompson gave the State a firm commitment and the solicitor discussed the proposed plea bargain with the victim's family.[135] The family objected to the proposed agreement and the State advised Thompson's attorneys that it would not conclude a plea bargain agreement.[136]

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128. *Id.* at ___, 292 S.E.2d at 584.

129. The supreme court considered other issues in *Thompson*, such as whether the Death Penalty Statute, S.C. CODE ANN. §§ 16-3-10 to -40 (1976 & Supp. 1981), was properly applied and whether the trial judge erred in not charging the jury on involuntary manslaughter and felony murder. Only the plea bargaining issue is considered in this survey.

130. The South Carolina Supreme Court has decided other issues involving plea bargaining. For instance, in Harden v. State, 276 S.C. 249, 277 S.E.2d 692 (1981) (per curiam), and Medlin v. State, 276 S.C. 540, 280 S.E.2d 648 (1981), the court adopted American Bar Association Standard 143.3 which allows judicial participation in plea bargaining and establishes guidelines for such participation. *See Criminal Law, Annual Survey of South Carolina Law*, 34 S.C.L. REV. 79 (1982).

131. ___ S.C. at ___, 292 S.E.2d at 583. Toubia was shot and killed on July 10, 1978, during the robbery of his small grocery store near Simpsonville, South Carolina. Thompson and two accomplices were arrested for the crimes. One accomplice pled guilty to armed robbery and murder; the other pled guilty to armed robbery and accessory to murder. *Id.* at ___, 292 S.E.2d at 583.

132. Brief for Appellant at 3; Record at 1291-92, 1404.

133. Brief for Appellant at 3; Record at 1404.

134. There was some dispute as to which party actually made the proposal. The appellant contended that the State intiated the proposal, Brief for Appellant at 3, while the State claimed that the appellant made the offer, Brief for Respondent at 1. The trial court concluded that the solicitor never made a firm commitment to the accused. ___ S.C. at ___, 292 S.E.2d at 583.

135. ___ S.C. at ___, 292 S.E.2d at 583.

136. Brief for Appelant at 1; Record at 1287-88, 1405. Thompson contended that

When the negotiations failed, Thompson sought an injunction against the State to prevent it from seeking the death penalty.[137] The trial court denied the appellant's motion for an injunction after finding that the solicitor had not made a firm commitment to the appellant concerning the proposal.[138] Thompson was tried by a jury and convicted of armed robbery and murder.[139] Upon the recommendation of the jury he was sentenced to death.[140]

In affirming Thompson's sentence, the South Carolina Supreme Court reasoned that the appellant was not entitled to enforce the pretrial plea proposal because the solicitor had never made a firm commitment to him during the negotiations.[141] The court distinguished *Santobello v. New York*[142] by observing that it required specific performance of a prosecutor's promise only when an accused pled guilty in reliance upon such a promise.[143] The court also rejected the appellant's argument, based upon *Cooper v. United States*,[144] that the State should have been enjoined from seeking the death penalty because of his "reasonable expectations" of a life sentence. The appellant asserted that these expectations were raised even though the negotiations had not produced an express agreement.[145] The court reasoned that the appellant could not enjoin the State from seeking the death penalty because, unlike the situation in *Cooper*,[146] the negotiations between the solicitor and the appellant were neither unam-

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this action by the victim's family made the case analogous to *Cooper*. *See infra* note 154 and accompanying text. Brief for Appellant at 6. The court, however, did not discuss this argument.

137. ___ S.C. at ___, 292 S.E.2d at 583.

138. *Id.* at ___, 292 S.E.2d at 583. *See also* Brief for Respondent at 3; Record at 1293-94.

139. ___ S.C. at ___, 292 S.E.2d at 583.

140. *Id.* at ___, 292 S.E.2d at 583.

141. *Id.* at ___, 292 S.E.2d at 584. The court found that "there was no promise made by the solicitors; there were merely negotiations." *Id.* at ___, 292 S.E.2d at 584.

142. 404 U.S. 257 (1971).

143. ___ S.C. at ___, 292 S.E.2d at 584.

144. 594 F.2d 12 (4th Cir. 1979).

145. ___ S.C. at ___, 292 S.E.2d at 584; Brief for Appellant at 5-6.

146. The court could have distinguished *Cooper* by citing another Fourth Circuit case, United States v. McIntosh, 612 F.2d 835 (4th Cir. 1979). In *McIntosh*, the Fourth Circuit held that "*Cooper* does not shun fundamental contract and agency principles when the content and validity of a plea bargain is at issue." *Id.* at 837.

biguous nor specific.[147] Further, the solicitor's promise to consider the proposal was made with reservations.[148]

The only United States Supreme Court case dealing with the issue of a defendant's right to enforce pretrial plea negotiations is *Santobello v. New York*.[149] In *Santobello*, the Supreme Court held that in the "interests of justice"[150] promises or agreements of the prosecutor which induce the accused to plead guilty must be enforced.[151] While the Court did not define the "interests of justice," Justice Douglas in a concurring opinion indicated that the decision rested upon constitutional grounds.[152] The Supreme Court remanded the case to the state court to determine whether the appropriate relief under the circumstances was specific performance of the prosecutor's agreement or withdrawal of the appellant's guilty plea.[153]

The Fourth Circuit Court of Appeals, in *Cooper v. United States*,[154] extended the Supreme Court's holding in *Santobello*

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147. The court never indicated what was ambiguous and unspecific about the negotiations. Perhaps the court found the negotiations ambiguous because of the dispute surrounding which party initiated the proposal.

148. ___ S.C. at ___, 292 S.E.2d at 584.

149. 404 U.S. 257 (1971). In *Santobello*, the accused agreed to withdraw his previous not guilty plea and enter a plea of guilty in exchange for the prosecutor's promise to make no recommendation during sentencing. After the defendant had entered a guilty plea, but before sentencing, the first prosecutor was replaced by another who was unaware of the former's promise. The second prosecutor recommended the maximum sentence, which was later imposed.

150. *Id.* at 262-63. The Supreme Court concluded that the interests of justice and recognition of the duties of the prosecution concerning promises made in negotiating guilty pleas are best served by remanding the case to the state court. *Id.*

151. *Id.* at 262. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled." *Id.*

152. *Id.* at 266-67. That *Santobello* rests upon constitutional grounds is further supported by the fact that the Supreme Court does not exercise supervisory jurisdiction over state prosecutorial actions. *See* Cooper v. United States, 594 F.2d at 15 n.3 (4th Cir. 1979).

153. 404 U.S. at 263. The South Carolina Supreme Court faced a similar plea bargain issue in State v. Lambert, 260 S.C. 617, 198 S.E.2d 118 (1973). In *Lambert*, the appellant sought to withdraw his guilty plea because the State had broken the plea agreement. The court held that the State had fulfilled its agreement and denied the appellant any relief. However, the supreme court went on to suggest in dictum that even if the State had broken the plea agreement, "the only relief even arguably available" under the circumstances would be to remand the case for resentencing in accordance with the agreement. *Id.* at 621, 198 S.E.2d at 120.

154. 594 F.2d 12 (4th Cir. 1979). *See generally* Recent Decision, *Enforcing Plea Bargains: A Step Beyond Contract Law*, 40 MD. L. REV. 90 (1981); Note, *Criminal Law -*

to enforce a prosecutor's plea proposal even though the negotiations between the prosecutor and the accused were not embodied in the form of an enforceable contract.[155] In *Cooper*, the Fourth Circuit held that a defendant's constitutional right to be treated with fairness throughout pretrial negotiations is "wider in scope than [that] defined by the law of contract."[156] The accused was therefore entitled to enforce the prosecutor's withdrawn offer even though the basic elements of an enforceable contract were missing.[157] In reaching this conclusion, the court gave constitutional protection[158] to the defendant's expectations, which were reasonably formed in reliance upon the integrity of the government.[159]

Several courts have rejected the reasoning in *Cooper*.[160] Most notably, the Third Circuit Court of Appeals in *Govern-*

Cooper v. United States - Constitutional Recognition for Defendants Plea Bargaining Expectations in the Absence of Detrimental Reliance, 58 N.C. L. REV. 599 (1980).

155. 594 F.2d at 18. In *Cooper*, an Assistant United States Attorney offered the defendant's counsel a proposed agreement under which the defendant would plead guilty to one count of obstruction of justice and agree to testify for the government in three ongoing trials. In exchange, the government would dismiss all other indictments against the defendant and bring his cooperation to the sentencing judge's attention. Before Cooper's counsel could contact the government's attorney to advise him of his client's acceptance, the government's attorney advised Cooper's counsel that the offer had been withdrawn. *Id.* at 15.

156. *Id.* at 16-17.

157. *Id.* at 16. The court agreed that the defendant could probably claim no right or show no violation under traditional contract principles. The court of appeals concluded, however, that a right and violation of that right were shown and granted the relief requested. *Id.*

158. The court noted that its decision rested upon two distinct sources of constitutional right: "the right to fundamental fairness embraced within substantive due process guarantees" and "the Sixth Amendment right to effective assistance of counsel." *Id.* at 18.

159. *Id.* "We hold that under appropriate circumstances—which we find here—a constitutional right to enforcement of plea proposals may arise before any technical 'contract' has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals." *Id.*

The court narrowly confined its decision to cover only a unique set of facts, a distinction that was later important in *Thompson*. The Fourth Circuit listed eight elements which made the government's proposal unique, two of which were that the proposal was specific and unambiguous and made without reservation. *Id.* at 19.

160. State v. Edwards, 279 N.W.2d 9 (Iowa 1979); State v. Caminita, 411 So.2d 13 (La. 1982); State v. Wheeler, 95 Wash.2d 799, 631 P.2d 376 (1981); State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979). *But see* Turner v. Fair, 476 F. Supp. 874 (D.Mass. 1979), and United States v. Fischetti, 475 F. Supp. 1145 (D.N.J. 1979).

ment of Virgin Islands v. Scotland[161] expressly declined to follow *Cooper* and held that, absent a defendant's detrimental reliance upon a prosecutor's promise, a jury trial is an adequate remedy for an unconsummated plea.[162] Similarly, most state courts continue to rely upon contract law analogies when considering the issue of enforcing pretrial plea negotiations.[163] These courts usually follow the rule that the state may withdraw from a plea agreement at any time prior to the entry of a guilty plea provided the defendant has not detrimentally relied on the plea agreement.[164]

The South Carolina Supreme Court's treatment of the plea bargaining issue raised in *Thompson* leaves unanswered an important question faced by all those involved in the plea bargaining process: at what point during plea negotiations does the defendant become entitled to specific performance of a particular plea proposal? At the very least, *Santobello v. New York* requires the enforcement of all promises made by the solicitor which induce the accused to plead guilty. Dictum in *Lambert v. State*[165] also suggests this conclusion.[166] The issue left unresolved by *Thompson*, however, is whether the accused is entitled to specific performance of a proposal offered by the solicitor but withdrawn prior to the defendant's communication of acceptance. Must the accused plead guilty before the solicitor's proposal will be enforced, or is some lesser form of detrimental reliance sufficient to require specific performance of a solicitor's proposal?[167] By distinguishing *Cooper* and deciding *Thompson* without addressing this issue, the South Carolina Supreme Court has missed an opportunity to give lower courts and solici-

161. 614 F.2d 360 (3d Cir. 1980).

162. *Id.* at 363.

163. *E.g.*, Parham v. State, 262 Ark. 241, 555 S.W.2d 943 (1977); Shields v. State, 374 A.2d 816 (Del. 1977), *cert. denied*, 434 U.S. 893 (1977); State v. Reasbeck, 359 So. 2d 564 (Fla. Dist. Ct. App. 1978); Bullock v. State, ___ Ind. App. ___, 397 N.E.2d 310 (1979); People v. Heiler, 79 Mich. App. 714, 262 N.W.2d 890 (1977).

164. *See, e.g.*, Shields v. State, 374 A.2d 816 (Del. Super. Ct. 1977), *cert. denied*, 434 U.S. 893 (1977); State v. Collins, 44 N.C App. 141, 260 S.E.2d 650 (1979).

165. 260 S.C. 617, 198 S.E.2d 118 (1973). *See supra* note 153.

166. *Id.* at 621, 148 S.E.2d at 120.

167. *E.g.*, divulging information to the police, testifying for the state, returning stolen goods, submitting to a lie detector test, *etc.* For a discussion of acts which constitute detrimental reliance, see Note, *Criminal Law - Cooper v. United States - Constitutional Recognition for Defendants Plea Bargaining Expectations in the Absence of Detrimental Reliance*, 58 N.C. L. REV. 599, 606-07 (1980).

tors guidance in this important area.

State v. Thompson should serve as a warning to solicitors and others involved in plea negotiations to be wary of offering or withdrawing proposed agreements in ambiguous situations. Solicitors should refrain from communicating or otherwise approving a plea bargain proposal until the solicitor is certain that the State is willing to negotiate the proposal to a conclusion.

Stephen E. Hudson

V. PROBATION AND PAROLE

In *Gates v. Wallace*,[168] the South Carolina Supreme Court held that for purposes of parole eligibility, a defendant is not entitled to credit for time served under a suspended sentence that is later reinstated and to which is added a new sentence imposed for a subsequent crime. *Gates* reflects South Carolina's policy against allowing a prior offender parole eligibility before a first offender who is sentenced to the same term of years.

The plaintiff, Richard N. Gates, was convicted in 1968 of armed robbery and sentenced to twenty-five years in prison.[169] This sentence was to be suspended after Gates served ten years and five years probation.[170] Gates was released on probation in 1974,[171] based upon time served and statutory credits for good behavior.[172]

In 1974, Gates was again convicted of armed robbery and was sentenced to twenty-five years in prison.[173] The trial judge also revoked the suspension and probation of Gates' prior sentence, which added fifteen years to the 1974 sentence.[174] Gates

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168. ___ S.C. ___, 294 S.E.2d 41 (1982).

169. *Id.* at ___, 294 S.E.2d at 41. Gates received a separate sentence of twenty-five years on each of three counts to run concurrently. *Id.* at ___, 294 S.E.2d at 41.

170. *Id.* at ___, 294 S.E.2d at 41. Gates subsequently received a consecutive sentence of one year for escape. Brief for Appellant at 2.

171. ___ S.C. at ___, 294 S.E.2d at 41.

172. *Id.* at ___, 294 S.E.2d at 41. For the statutes creating the credits under which Gates was released, see S.C. CODE ANN. §§ 24-13-210, -20 (1976 & Supp. 1981).

173. Brief for Appellant at 2.

174. Record at 1. The trial judge could have sentenced Gates to twenty-five years and ignored the probation violation. Gates would then have been eligible for parole in eight and one-third years. He could have revoked the probation and had the sentences run concurrently. However, the trial judge, no doubt influenced by the fact that Gates was barely out of the penitentiary when he committed the second armed robbery, elected

later received a consecutive sentence of six years for attempted escape, an additional armed robbery, possession of contraband, and taking hostages.[175] Thus, Gates' sentence totalled forty-six years[176] and made him eligible for parole after the service of ten years, according to section 24-21-610(2) of the South Carolina Code.[177]

In 1979, Gates brought the instant class action against the parole board.[178] He sought a declaratory judgment that sections 24-13-40 and 24-21-460[179] require that a prisoner receive credit for time served on a previously suspended sentence which is later reinstated.[180] Gates argued that the parole board incorrectly computed his parole eligibility from October 1974, the date of the revocation of his probation and reinstatement of his suspended sentence.[181] Gates maintained that section 24-13-40

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to sentence Gates to the maximum term at his disposal, a total of forty years. (Gates' previous twenty-five year sentence included a ten year suspended sentence and five years of probation. Both the suspension and probation were revoked, thus adding a total of fifteen years to the sentence.) Record at 31.

175. ___ S.C. at ___, 294 S.E.2d at 42.

176. *Id.* at ___, 294 S.E.2d at 42.

177. *Id.* at ___, 294 S.E.2d at 42. S.C. CODE ANN. § 24-21-610(2)(1976 & Supp. 1981) provides as follows:

> In all cases cognizable under this chapter, the Probation, Parole and Pardon Board may, upon ten days' written notice to the solicitor and judge who participated in the trial of any prisoner, parole such prisoner convicted of a felony and imprisoned in the State Penitentiary, in any jail or upon the public works of any county . . . (2) Who if sentenced to life imprisonment or imprisonment for any period in excess of thirty years, shall have served at least ten years. . . .

Thus, even without reinstating the fifteen year suspended sentence, Gates would not have been eligible for parole until he served ten years.

178. The named defendants were the director of the South Carolina Probation, Parole, and Pardon Board and the Probation, Parole and Pardon Board itself. ___ S.C. at ___, 294 S.E.2d at 41.

179. S.C. CODE ANN. § 24-13-40 (1976) provides in pertinent part:

> The computation of the time served by prisoners under sentences imposed by the courts of this State shall be reckoned from the date of the imposition of the sentence. But when . . . (b) the commencement of the service of the sentence follows the revocation of probation . . . the computation of the time served shall be reckoned from the date of the commencement of the service of the sentence.

S.C. CODE ANN. § 24-21-460 (1976) empowers the circuit court to revoke probation upon violation of the terms of probation.

180. Record at 1-2.

181. Gates asserted that he was currently eligible for parole since under § 24-21-610 he is required to serve ten years, and because § 24-13-40 states that time served shall be computed from the date of sentence imposition. Record at 29.

requires the parole board to compute time served from February 1968, the date of the imposition of his original sentence.[182] The parole board asserted that for purposes of parole eligibility following revocation of probation, section 24-13-40(b) applies and requires that time served be computed from the date of revocation of probation, not from the date of imposition of the original sentence.[183] At trial, the court granted the defendants' motion for summary judgment.[184] On appeal, the supreme court affirmed the trial court's decision.[185]

The court held that the trial judge properly interpreted section 24-13-40[186] to require that any previously suspended sentence receive the same treatment as a new sentence when computing parole eligibility.[187] The court rejected Gates' argument that time served should be computed from the commencement of the original sentence if a portion of that sentence is later reinstated. The court reasoned that under Gates' argument, prior offenders would be eligible for parole before first offenders.[188] Finding this to be an unacceptable alternative, the court noted that the availability of credit would provide an incentive to engage in criminal conduct.[189]

As authority for this decision, the court in *Gates* cited *Miller v. Cox*[190] and *Campbell v. State*.[191] In *Miller*, the appellant petitioned for a writ of habeas corpus alleging that the state of Virginia must grant credit against a criminal sentence based

182. Brief for Appellant at 4. Gates also argued that § 24-21-460 required that the parole board treat Gates as if no probation or suspended sentence existed. Brief for Appellant at 4-5. S.C. CODE ANN. § 24-21-460 provides that upon a probation violation the court "may revoke the probation or suspension of sentence and shall proceed to deal with the case as if there had been no probation or suspension of sentence. . . ." However, this section speaks in terms of the "court," not of the "parole board." Record at 30.

183. Record at 29. The parole board stated: "in situations of this nature, it has been our practice to treat the revoked portion as a new sentence and resultantly, compute the eligibility date from the date of revocation." Record at 8.

184. ___ S.C. at ___, 294 S.E.2d at 41.

185. *Id.* at ___, 294 S.E.2d at 41.

186. *See supra* note 178.

187. ___ S.C. at ___, 294 S.E.2d at 42.

188. "The time served on a prior conviction would make repeat offenders . . . eligible for parole on subsequent convictions before a first offender would be eligible." *Id.* at ___, 294 S.E.2d at 42.

189. *Id.* at ___, 294 S.E.2d at 42 (citing Miller v. Cox, 443 F.2d 1019 (4th Cir. 1971)).

190. 443 F.2d 1019 (4th Cir. 1971).

191. 275 S.C. 249, 269 S.E.2d 344 (1980).

upon the time served under a prior and subsequently invalidated convction.[192] The Fourth Circuit affirmed the district court and held that the state was not required to allow parole credit toward a sentence based on a prior invalidated conviction.[193] In *Campbell*, the appellant sought credit against a sentence for burglary and armed robbery based upon the time served on a conviction for safecracking which was later invalidated.[194] Citing *Miller*, the *Campbell* court rejected the appellant's claim and held that any other decision would encourage criminal activity by providing a sense of immunity.[195] While the facts in both *Miller* and *Campbell* are distinguishable from those in *Gates*,[196] the South Carolina Supreme Court nevertheless reached the correct decision based upon the policies involved.[197]

Gates is arguably inconsistent with prior South Carolina case law. When the court revoked the suspended status of Gates' original sentence and refused to allow him credit for the time already served under that sentence, the court treated the suspended and unsuspended portions as two individual sentences.[198] Such treatment of a suspended sentence is inconsistent with *Pickelsimer v. State*,[199] but, as the court noted, necessary under the particular facts of *Gates* to prevent the undesirable result of prior offenders becoming eligible for parole before first offenders.[200]

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192. 443 F.2d at 1022.

193. *Id.*

194. 275 S.C. at 250, 269 S.E.2d at 345.

195. *Id.*, 269 S.E.2d at 345.

196. Both cases concern situations in which the appellants sought credit against one sentence for the time served under another completely separate sentence. In *Gates*, the appellant sought credit for time served on one sentence when the suspended portion of the same sentence was reinstated.

197. *See supra* notes 176, 188-89 and accompanying text.

198. *See supra* note 183.

199. 254 S.C. 596, 176 S.E.2d 536 (1970). In *Pickelsimer*, the court held that when a defendant is sentenced to a term of years, suspended upon the service of a portion of that term, the defendant may apply for parole only after one-third of the entire sentence has been served. The court reasoned that when a part of a sentence is suspended, the individual is simply being allowed to serve a portion of the sentence away from the penal institution. Therefore, the entire sentence, and not the portion to be served in prison, must be used as the basis for computation of parole eligibility. *Id.* at 600, 176 S.E.2d at 538.

200. ___ S.C. at ___, 294 S.E.2d at 42.

Gates v. Wallace stems from a policy of not allowing prior offenders parole eligibility before first offenders. After *Gates*, one may assume that the single-sentence rule of *Pickelsimer* will still apply when its application would not make a prior offender eligible for parole before a first offender.

M.M. Weinberg, III

VI. Right to Fair Trial Abridged by Undesirable Conditions in the Courtroom

In *State v. Stewart*,[201] appellant won reversal and a new trial after being convicted of her husband's murder. The South Carolina Supreme Court found that the trial court did not sufficiently control the disruptions in the overcrowded courtroom, nor did it adequately investigate the improper activity of one spectator and its potentially prejudicial effect on the jury. The supreme court held that these conditions deprived appellant of her right to a fair trial.[202]

During appellant's trial the courtroom seats were filled and additional spectators were permitted to stand along the walls. The trial judge issued several admonitions to the spectators after there had been outbursts of laughter and a report by the jury forelady that one spectator had been glaring with apparent disgust toward the jury. The same spectator was also reported to have made opinionated remarks regarding the case within the hearing of several jurors before they were sworn.[203]

Upon being made aware of these reports, the defense moved for a mistrial asserting that the jury had been prejudiced. The trial judge recognized the seriousness of the improper activity, but overruled defendant's motion, relying instead on his instructions to the jury to dissipate any prejudice that might have been created. The supreme court found that the judge's precautions were insufficient to guarantee appellant a fair trial and remanded the case for a new trial.[204]

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201. ___ S.C. ___, 295 S.E.2d 627 (1982), *cert. denied*, 103 S. Ct. 64 (1982).

202. *Id.* at ___, 295 S.E.2d at 631.

203. *Id.* at ___, 295 S.E.2d at 629-30. This spectator continually glared at the jury with "obvious disgust," but left the courtroom before the complaint was made to the judge. *Id.* at ___, 295 S.E.2d at 630.

204. *Id.* at ___, 295 S.E.2d at 629-31. Concurring and dissenting, Justice Ness argued

In finding the appellant's right to a fair trial had been impaired, the supreme court was concerned with both the atmosphere created by an overcrowded courtroom and the improper activity of the misbehaving spectator. While the court acknowledged that an excessive number of spectators would not, by itself, create grounds for a mistrial,[205] it went on to observe that "[a]n overcrowded courtroom tends to create an improper atmosphere and is not conducive to calm deliberations by the jury."[206] It is unclear from the court's opinion how much disruption will be tolerated before a defendant's rights are impaired, although it is certain that such a point can be reached.[207] What is clear from the opinion is that the court expects the trial judge to control events in the courtroom so that, if possible, a mistrial will be avoided.[208] In this regard, the court suggested that the

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that the circumstantial evidence exclusively relied upon by the State was insufficient to support the murder conviction. He emphasized that one should view the evidence "in accordance with the standard of review mandated by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307 (1979). ___ S.C. at ___, 295 S.E.2d at 632. *Jackson* held in pertinent part:

> [I]n a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 [the federal habeas corpus statute] . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

443 U.S. at 324. Arguably, this standard of appellate review is also mandated for state appellate courts. *See id.* at 336 (Stevens, J., concurring). The South Carolina Supreme Court previously used this standard in State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981), but the *Stewart* majority, citing *Hudson*, used the following standard: "Whether the evidence constitutes positive proof of facts and circumstances which reasonably tends to prove the guilt of the accused, or from which guilt may be fairly and logically deduced to the exclusion of any other reasonable hypothesis. The evidence must be viewed most favorably to the State." ___ S.C. at ___, 295 S.E.2d at 629.

In a petition for certiorari to the United States Supreme Court, the appellant presented two questions. First, must state appellate courts apply the *Jackson* standard of appellate review? Second, under the *Jackson* standard, was the evidence sufficient in *Stewart*? 51 U.S.L.W. 3008 (U.S. July 13, 1982).

205. ___ S.C. at ___, 295 S.E.2d at 629. See also Pennekamp v. Florida, 328 U.S. 331, 361-62 n.9 (1946) (Frankfurter, J., concurring)(quoting *Recommendations of Special Committee on Ways of Curbing Excessive Publicity in Connection with Criminal Trials—Executive Committee Recommends Special Association Committee to Cooperate with Committees from Press and Radio Organizations*, 22 A.B.A.J. 79, 79 (1936)).

206. ___ S.C. at ___, 295 S.E.2d at 629.

207. The South Carolina Supreme Court reversed a criminal conviction in State v. Weldon, 91 S.C. 29, 74 S.E. 43 (1912), because the crowd intruded into the bar in an effort which the court viewed as calculated to influence the jury.

208. ___ S.C. at ___, 295 S.E.2d at 631.

number of spectators be limited to the seating capacity of the courtroom.[209]

A defendant has a right to a public trial by an impartial jury,[210] but no court has held that every person who wishes to attend a trial must be admitted.[211] If any spectator's conduct interferes with the courtroom proceedings, the misbehaving individual may be removed.[212] Some jurisdictions have held that a single outburst by a spectator is unlikely to create prejudice if the trial judge immediately instructs the jury to disregard the outburst,[213] but, as the court in *Stewart* pointed out, when several admonitions are required to control an overcrowded and disruptive courtroom, the "conditions clearly [interfere] with the conduct of the trial."[214]

The supreme court also stated that the trial judge erred in neither investigating the reported activity of the misbehaving spectator nor determining the extent to which prejudice might have been created by the misconduct.[215] In reaching this determination, the court quoted extensively from *State v. Salters*,[216] a case in which the verdict was reversed solely because the trial judge did not take the initial step of ascertaining whether certain newspaper articles were prejudicial.[217] *Salters* outlined a two-step process to ensure a fair trial after the occurrence of allegedly prejudicial events. First, the judge must determine whether the events are prejudicial. In *Salters*, the court could

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209. *Id.* at ___, 295 S.E.2d at 629.

210. U.S. CONST. amend. VI; S.C. CONST. art. I, § 14. *See generally* In re Oliver, 333 U.S. 257, 266-72 (1948)(history of public trials); 6 J. WIGMORE, EVIDENCE § 1834 (Chadbourn ed. 1976)(policy reasons behind public trials).

211. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 551, 581-82 n.18 (1980); Tinsley v. Commonwealth, 495 S.W.2d 776, 780 (Ky. 1973), *cert. denied*, 414 U.S. 1077 (1973) and 414 U.S. 1145 (1974). *See generally* Annot., 48 A.L.R.2d 1436, 1449 (1956).

212. United States v. Kobli, 172 F.2d 919, 922 (3d Cir. 1949). *See also*, United States v. Fay, 350 F.2d 967, 971 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966)("When the trial judge has reason to believe that any persons or any groups of spectators are disorderly and may continue to be so he may exclude individuals or groups as the occasion requires.").

213. *E.g.*, Sheppard v. State, 235 Ga. 89, 218 S.E.2d 830 (1975)(murder trial in which victim's mother cried out, "Oh my child," and rushed crying out of the courtroom).

214. ___ S.C. at ___, 295 S.E.2d at 631.

215. *Id.* at ___, 295 S.E.2d at 630.

216. 273 S.C. 501, 257 S.E.2d 502 (1979).

217. *Id.* at 507, 257 S.E.2d at 505.

make this determination by referring to the newspaper articles themselves, while in *Stewart*, the judge would have had to rely on the reports of witnesses or jurors. After a reasonable showing that a potentially prejudicial event has occurred, the second step in *Salters* requires the judge to conduct an inquiry, or *voir dire*, of the jury to determine if the inflammatory event created any prejudice.[218]

Failure to observe these precautionary measures in the face of occurrences which could have affected the jury's impartiality led to new trials in both *Stewart* and *Salters*. The *Stewart* decision provides additional notice that noisy, overcrowded courtroom conditions may impair the orderly conduct of a trial to such an extent that mere jury instructions will not guarantee the defendant a fair trial.

Max G. Mahaffee

VII. STANDARDS FOR COURT-ORDERED SURGERY

In *State v. Allen*,[219] the South Carolina Supreme Court considered a criminal defendant's appeal from a lower court order requiring him to submit to the surgical removal of a bullet lodged in his shoulder. The lower court granted a hearing on the solicitor's request for the order after establishing that there was probable cause for the charges brought against the appellant and that the bullet was critical evidence for which the State showed a substantial need.[220] The lower court ordered the removal of the bullet from appellant's body but refused to order the removal of a bullet from his co-defendant, Childers, because the more extensive surgical procedures required could not be imposed without impinging on the co-defendant's right against unwarranted search and seizure.[221] The supreme court dismissed the appeal and adopted the lower court's order as its directive.[222]

In March 1982, an attempted armed robbery of a supermarket escalated into a gun battle between two assailants and the proprietor of the market. The proprietor was injured, his wife

218. *Id.* at 506, 257 S.E.2d at 504.
219. 277 S.C. 595, 291 S.E.2d 459 (1982).
220. *Id.* at 595, 291 S.E.2d at 45960.
221. *Id.* at 603, 291 S.E.2d at 463. The State did not appeal this denial of surgery.
222. 277 S.C. at 596, 291 S.E.2d at 459.

was killed, and both bandits were apparently shot before they escaped. Appellant Allen was apprehended within three minutes of the shooting and his co-defendant was arrested nearby. Physical examinations of the defendants revealed that each had recently suffered gunshot wounds. Appellant had a bullet lodged less than one-quarter of an inch under the skin of his shoulder while the bullet in his co-defendant was embedded in the thoracic cavity.[223] The lower court held a hearing to determine if the defendants should be compelled to undergo the surgical removal of the bullets. At the hearing, the court heard medical testimony which established the procedures required to retrieve the bullets and the resultant risks to which each defendant would be exposed. In appellant's case, the court found that the bullet could be removed in a very simple procedure with only minimal risk to his health.[224] However, major surgery would have been required to remove the more deeply embedded slug from his co-defendant.[225] The lower court granted an order for the removal of appellant's bullet but declined to order the removal of his co-defendant's bullet, ruling that the required surgery would be an impermissible intrusion into the co-defendant's body.[226]

In deciding that appellant's rights would not be violated if the bullet were removed, the court referred to medical testimony indicating that the surgery involved an incision of less than one inch and would take approximately fifteen minutes to complete. The procedure would require only local anesthesia and the likelihood of infection was slight, so that the appellant faced minimal risks.[227] Furthermore, there was testimony indicating that appellant's health would suffer if the bullet were not removed. The removal of the bullet from his co-defendant, on the other hand, would necessitate the administration of general anesthesia and an incision up to eight inches long and one inch deep through subcutaneous tissue and bone. While the risks which attended such an operation were no more likely to materialize than the risks faced by appellant, the higher potential hazard to

223. *Id.* at 601, 291 S.E.2d at 462-63.
224. *Id.* at 602, 291 S.E.2d at 463.
225. *Id.* at 603, 291 S.E.2d at 462.
226. *Id.*, 291 S.E.2d at 463.
227. *Id.*, 291 S.E.2d at 463.

the co-defendant's health, if problems did occur, corresponded with the increased complexity of the operation. Lastly, the doctors testifying agreed that the operation was not medically required. Thus the court weighed the complexity of each operation, the risks involved, and the medical necessity for each procedure before determining whether the defendant's rights would be jeopardized.

The decision in *Allen* follows the analysis and procedures developed by five states and the District of Columbia in allowing court-ordered surgery when justified by a need for the evidence and when performed in a professional manner.[228] Although not faced directly with a request for court-ordered surgery, two other states have indicated their approval of this type of surgery.[229] One state has concluded that court-ordered surgery is per se violative of the fourth amendment.[230]

The lower court in *Allen* based its decision primarily on *Schmerber v. California*,[231] which addressed the issue of state-ordered extraction of blood from a suspected drunken driver.[232] While noting that "[t]he overriding function of the fourth amendment is to protect personal privacy and dignity against unwarranted intrusions by the State,"[233] the United States Su-

228. *See* United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974); Hughes v. United States, 429 A.2d 1339 (D.C. 1981); Doe v. State, 409 So. 2d 25 (Fla. Dist. Ct. App. 1981); Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. dismissed*, 410 U.S. 975 (1973); State v. Overstreet, 551 S.W.2d 621 (Mo. 1977); People v. Smith, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (1974).

229. State v. Anonymous, 32 Conn. Supp. 306, 353 A.2d 789 (1975)(dictum); State v. Martin, 404 So.2d 960 (La. 1981)(remanding to the trial court for appointment of a three-doctor panel to examine the defendant and report on the feasibility of surgery).

230. Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied sub nom.*, Indiana v. Adams, 415 U.S. 935 (1974).

231. 384 U.S. 757 (1966).

232. The court makes frequent reference to an earlier case, Rochin v. California, 342 U.S. 165 (1952). In that case, the Supreme Court imposed a duty on lower courts to exercise cautious judgment in ascertaining whether a requested type of surgery would "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Id.* at 169 (citing Malinski v. New York, 324 U.S. 401, 416-17 (1945)). The Court found that conduct by government agents who first tried to remove a capsule forceably from a defendant's mouth and then forced the extraction of his stomach's contents constituted "conduct that shocks the conscience" and was "bound to offend even hardened sensibilities." *Id.* at 172. The Court reversed Rochin's conviction because the government agents' actions, including illegally breaking into his home, violated Rochin's due process rights.

233. 384 U.S. at 767.

preme Court held that "minor intrusions into an individual's body under stringently limited conditions"[234] are acceptable. The court further held that the fifth amendment's privilege against self-incrimination extended only to instances of compelled "communications" or "testimony."[235] The blood test, which is neither, was not privileged information.

Commentators have criticized *Schmerber* for its failure to enunciate clearer standards for major, as opposed to minor, bodily intrusions.[236] In fourth amendment search and seizure cases, however, the courts have long held that reasonableness is properly decided only on the facts and circumstances of each case.[237] Nevertheless, *Allen* provides some logical conclusions regarding the factors likely to be considered in bullet-removal cases in South Carolina. Dictum in the case suggests that any operation which will require general anesthesia is major and unwarranted in light of the greater risk to the defendant's health inherent in the use of general anesthesia.[238] In addition, if examining physicians predict any significant pain, loss of blood, or extended hospitalization, the court will probably deny the requested surgery in order to stay within the guidelines set by *Schmerber*. The *Allen* court also considered the medical necessity of removal as a factor.[239] Although the court arguably would have ordered the minor surgery absent the medical necessity testimony, one may assume that few or no major operations will be ordered without it.[240]

Although following sound case law, the court did not explicitly adopt a prescribed procedure, such as the one developed in

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234. *Id.* at 772.

235. *Id.* at 761.

236. *See* Comment, *Search and Seizure: Compelled Surgical Intrusions?* 27 BAYLOR L. REV. 305, 309 (1975). *See also* Note, *Constitutional Law-Search and Seizure—Georgia Supreme Court Expands Upon Extent of Permissible Body Intrusions*, 24 MERCER L. REV. 687, 690 (1973).

237. Ker v. California, 374 U.S. 23 (1963); United States v. Rabinowitz, 339 U.S. 56 (1950). *See, generally,* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974).

238. *See* 277 S.C. at 602, 291 S.E.2d at 462.

239. *Id.* at 602, 291 S.E.2d at 462-63.

240. Only one other case, State v. Richards, 585 S.W.2d 505 (Mo. App. 1979), specifically mentions medical necessity as a factor. Medical necessity will seldom exist, however, because any bullet which endangers the defendant's life will probably be removed, if possible, during preliminary medical treatment.

Missouri and the District of Columbia.[241] In *United States v. Crowder*,[242] the Court of Appeals for the District of Columbia held that in any bullet-removal case: (1) the evidence must be relevant, obtainable in no other way, and probable cause must exist to believe the surgery will produce it; (2) the operation must be minor and performed by a skilled surgeon with every possible precaution taken to protect the defendant's health; (3) the defendant must have an adversarial hearing, with counsel present, prior to the ordered surgery; and (4) the defendant must be given an opportunity to seek appellate review of the order before the operation is performed.[243] Although the court followed these steps in *Allen*, the explicit adoption of this procedure as a *sine qua non* to court-ordered surgery would eliminate any confusion on proper procedure in the trial court.

State v. Allen adopts the rule in South Carolina that a judge, upon a showing of probable cause, may order the surgical removal of a bullet from a defendant if the surgery is minor and will not significantly endanger the health of a defendant. For the sake of clarity, however, one would hope that in a future decision the court will adopt the more complete procedure set forth in *United States v. Crowder* in order to ensure fairness and consistency to those defendants upon whom the State seeks to impose court-ordered surgery.

Thomas C. Taylor

241. *See* United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); State v. Overstreet, 551 S.W.2d 621 (Mo. 1977); State v. Richards, 585 S.W.2d 505 (Mo. App. 1979).

242. 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

243. *Id.* at 316.